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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 IN RE MTBE LITIGATION

11 Civ. 1898 (SAS)

4 -----x

New York, N.Y.  
October 28, 2015  
2:30 p.m.

5  
6 Before:

7 HON. SHIRA A. SCHEINDLIN

8 District Judge

9 APPEARANCES (via telephone)

10 NATHAN SHORT

11 SCOTT KAUFF

12 WILL PETIT

CARLA BURKE

Attorneys for Plaintiffs

13 BARRY TEMKIN

14 JAMES PARDO

Attorneys for Defendants

15 ROBERT GOODMAN

16 PETER LIGH

ADRIAN SANCHEZ PAGAN

17 Observing for Defendants

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(Telephone conference; in chambers)

THE COURT: Good afternoon. Is Mr. Short on the line?

MR. SHORT: Yes, your Honor, this is Nathan Short with the Commonwealth.

THE COURT: Ms. Burke?

MS. BURKE: Yes, your Honor.

THE COURT: Mr. Kauff?

MR. KAUFF: Yes, your Honor. Good afternoon.

THE COURT: And Mr. Petit?

MR. PETIT: Yes, your Honor. Good afternoon.

THE COURT: Anybody else from the plaintiff?

OK. Mr. Temkin?

MR. TEMKIN: Yes, good afternoon.

THE COURT: And Mr. Pardo?

MR. PARDO: Good afternoon, your Honor.

THE COURT: Good afternoon. And then observers. I understand Mr. Goodman?

MR. GOODMAN: Yes, your Honor. And I would also request the permission to speak if it's appropriate.

THE COURT: We will see.

Mr. Ligh?

MR. LIGH: Good afternoon, your Honor.

THE COURT: Mr. Wilson? Is there a Mr. Rob Wilson on the call? No.

Mr. Lutz? No?

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Mr. Pagan?

MR. SANCHEZ: Sanchez. Yes, your Honor. Good afternoon.

THE COURT: Oh, Mr. Sanchez Pagan. OK, very good.

Is there anybody whose name I didn't call?

MS. SHAH: Yes, your Honor, Ms. Shah from Southerland Haskell & Brennan.

THE COURT: I'm sorry. What's the name again?

MS. SHAH: Pat Shah, S-H-A-H, from Southerland.

THE COURT: Representing?

MS. SHAH: Just an observer.

THE COURT: OK, right, very good.

So we're having this telephone conference call today with respect to the Trammo motion to dismiss in the Puerto Rico II MTBE litigation. Trammo has moved on the grounds that it says it cannot be sued because it was dissolved according to the laws of Delaware in 2007, and it can't be sued more than three years after dissolution.

In support of that, Trammo has submitted an affidavit demonstrating that it did dissolve in 2007. At the time of dissolution it had a net worth of negative \$4.7 million. It also submitted a declaration of a Mr. Markstein, Mr. William Markstein, and he explained that when the corporation dissolved it assigned its remaining supply contract and sold its remaining inventory to Colonial Caribbean -- I should say

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1 before if dissolved, and that was in 2005.

2 The Commonwealth nonetheless believes that it can go  
3 ahead with this lawsuit. It says that assets must have been  
4 distributed after both contracts, other than Trammo couldn't  
5 have had a negative net worth at dissolution. It also says  
6 that Trammo never did dissolve because it failed to comply with  
7 Delaware's wind-up procedures.

8 So the question now I suppose is whether any discovery  
9 is needed now that this has been converted to a Rule 56 motion.  
10 I would like to dispose of one of the arguments up front.  
11 Delaware law is absolutely clear that dissolution is effective  
12 on the filing of the certificate of dissolution, so it really  
13 doesn't matter whether there was a failure to comply with  
14 wind-up procedures. If there was such a failure, that may lead  
15 to liability of directors, I don't know, who may have breached  
16 their fiduciary duty to creditors. But even that argument  
17 wouldn't have much meaning if there were no assets that were  
18 set aside.

19 But, in any event, it's no argument that there wasn't  
20 a dissolution. There was a dissolution, and I'm ready to tell  
21 you that now as a matter of law. Because that is clear  
22 Delaware law. In the statute, Delaware Code Section 275(f)  
23 states "Upon a certificate of dissolution becoming effective in  
24 accordance with Section 103, the corporation shall be  
25 dissolved." And Section 103 says "Any instrument filed in

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1 accordance with Subsection C shall be effective upon its filing  
2 date." Then there is a Delaware chancery case, In Re  
3 Transamerica, which says dissolution became effective upon the  
4 filing of certificate of dissolution. So, I think that  
5 argument is not to be taken further.

6 So, I'd like to hear from the Commonwealth where you  
7 really think you can go with this effort to keep Trammo in the  
8 case and what if any discovery you need to oppose the motion to  
9 dismiss, which is now --

10 MR. SHORT: Your Honor, this is Nathan Short on behalf  
11 of Commonwealth. I think there are two avenues. One we  
12 discuss in our briefs is the appointment of a receiver. This  
13 discovery --

14 THE COURT: Which you haven't sought before.

15 MR. SHORT: Correct.

16 THE COURT: Right.

17 MR. SHORT: We're hopeful that we will be able to  
18 resolve any factual disputes and either make a determination  
19 it's appropriate to seek the appointment of receiver in another  
20 judicial forum or, where appropriate, to dismiss.

21 THE COURT: Right. So, what do we need to get that  
22 accomplished.

23 MR. SHORT: One would be whether or not assets were  
24 distributed in advance of the filing of dissolution.

25 THE COURT: So whether assets were distributed say

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1 between 2005 and 2007?

2 MR. SHORT: Right.

3 THE COURT: Well, who is representing Trammo on this  
4 call?

5 MR. TEMKIN: Barry Temkin and Bob Goodman.

6 THE COURT: OK. So maybe you can answer that now, or  
7 begin to.

8 MR. TEMKIN: Yes. Temkin here. I will be happy to  
9 give it a shot. I think if I read their opposition to our  
10 motion, on pages 8 and 9 what the plaintiffs seem to be saying  
11 is that there is a 2005 transaction in which there was an  
12 assignment assumption of Trammo Caribbean's assets to some  
13 other company.

14 THE COURT: Right.

15 MR. TEMKIN: And we've asked our client to come up  
16 with the documents --

17 THE COURT: Right.

18 MR. TEMKIN: -- for that transaction. So it shows a  
19 transfer from Trammo Caribbean to the supplier of that gas  
20 shipment contemporaneously, so the money comes into Trammo  
21 Caribbean and goes right out to I think it's called Atlantic is  
22 the shipper. So there is nothing that we found other than  
23 contemporaneous payment for value, and we don't object to  
24 providing that to the plaintiff. I don't think they've  
25 articulated anything else, and I think everything else is just

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1 speculation and a fishing expedition.

2 THE COURT: Well, I'm not interested in the word  
3 "speculation" and "fishing expedition". They've asked to  
4 determine whether there was a transfer of any assets. You've  
5 mentioned one; you said you're willing to give them the  
6 documents of that. If you represent that you have searched and  
7 there are no others, then that's that. It's not a matter of a  
8 fishing expedition; they say they have the right to know about  
9 transfer of assets. Are there any others? Are there any  
10 others that have to do before the filing of the dissolution,  
11 before 2007?

12 MR. TEMKIN: The only other transfer I'm aware of,  
13 your Honor -- Temkin here -- is that at around the time of the  
14 dissolution -- and I can give you the exact date -- but around  
15 that time Trammo Caribbean had a negative net worth of about \$4  
16 million --

17 THE COURT: Right.

18 MR. TEMKIN: -- and it made a transfer I think on  
19 August 21, 2007 to its parent of \$99,000 to pay an antecedent  
20 debt to the parent.

21 THE COURT: OK. And can you make those documents  
22 available?

23 MR. TEMKIN: Yes, we will provide that document to the  
24 other side.

25 THE COURT: All right.

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1 MR. TEMKIN: And we will talk to them about what other  
2 documents they are seeking, to convince them that there is  
3 nothing else.

4 THE COURT: Right.

5 MR. TEMKIN: No other transfers.

6 THE COURT: That's right, we're looking for any other  
7 transfers prior to the dissolution. And these contracts that  
8 occurred in 2005 when you sold the assigning of the supply  
9 contract and selling remaining inventory to Colonial Caribbean,  
10 do they have the documentation on that?

11 MR. TEMKIN: Yes, we do, your Honor.

12 THE COURT: I'm sorry. You already produced that to  
13 plaintiff?

14 MR. TEMKIN: Of course, yes.

15 THE COURT: You already have?

16 MR. TEMKIN: I'm sorry. I think we have produced --  
17 there are three contracts involved in the deal; two of them, as  
18 I recall, were attached to the Markstein declaration, and there  
19 is a third called a frame agreement that we haven't produced,  
20 but we do not object to producing it, if it moves the case  
21 along.

22 THE COURT: It does. So you will produce all the  
23 three things that we have discussed during this call.

24 MR. TEMKIN: Yes, your Honor.

25 THE COURT: So then back to -- I'm sorry, who was the



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1 plaintiff counsel who spoke earlier?

2 MR. SHORT: This is Nathan Short.

3 THE COURT: Yes, sorry, so back to Mr. Short. So  
4 assuming that you have that, what is left to do?

5 MR. SHORT: There is one other category, that would be  
6 a declaration that Caribbean does not have either any general  
7 liability policies -- well, specifically general liability  
8 insurance policies. The declaration isn't particularly clear  
9 that they do not have it. It seems to state that they are not  
10 being indemnified currently.

11 THE COURT: You are talking about Trammo Caribbean  
12 that filed dissolution in 2007.

13 MR. SHORT: Correct. That would be considered an  
14 asset under Delaware case law.

15 THE COURT: Well, I don't know about that. I mean you  
16 still are stuck with the three year deadline to file following  
17 dissolution. We're here in 2015. I guess you filed Puerto  
18 Rico II when?

19 MR. SHORT: We filed Puerto Rico II in 2013.

20 THE COURT: Yeah, right. So I mean that was six years  
21 after dissolution. It's hard to understand how you can get  
22 around that problem no matter what, since I've rejected your  
23 argument about the wind-up procedure, that it doesn't matter.  
24 It may give you another avenue against individuals, but it  
25 gives you nothing against Trammo. So whether they had that

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1 policy at one time or not doesn't seem to me to have a lot of  
2 relevance. But if Mr. Short knows the answer and is willing to  
3 discuss that, that's all for the best too.

4 Do you know the answer to that question?

5 MR. TEMKIN: This is Temkin. You said Mr. Short. Do  
6 you mean me?

7 THE COURT: Yes, I'm sorry, I mean Trammo's lawyers.  
8 Do you know the answer to that? I apologize. I'm traveling,  
9 so it's a little harder to get the names of people when I'm not  
10 in the office, but, yes, Trammo's counsel.

11 MR. TEMKIN: No problem. Yeah, we do know Trammo  
12 received a denial of coverage from its insurance carrier.

13 THE COURT: When was that?

14 MR. TEMKIN: Two years ago.

15 THE COURT: And the carrier had a policy when? What  
16 did it cover? In other words, what was the policy year and  
17 what years did it cover?

18 MR. TEMKIN: I will have to get you that.

19 THE COURT: OK.

20 MR. TEMKIN: But my understanding, we have the  
21 declination letter.

22 THE COURT: I know.

23 MR. TEMKIN: And my understanding is that the letter  
24 says this is not a covered event.

25 THE COURT: Right. All right. But I think if you can

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1 find information about the policy, and the policy period  
2 covered, and the declination letter, you can turn that over  
3 too.

4 Because at the end of all that, I don't know what more  
5 Mr. Short could ask for to resolve this. It may be that he  
6 needs to concede to this particular and see if he has another  
7 avenue to pursue.

8 Mr. Short, when you get this information that has been  
9 agreed to on this call, what else do you need?

10 MR. SHORT: Understanding your Honor's position on the  
11 other argument, I believe those are the two items that speak to  
12 assets that Caribbean might have.

13 THE COURT: Right. And we have discussed the  
14 insurance coverage issue. So I said I think this motion needs  
15 to be resolved. I think it will be resolved in Trammo's favor.  
16 You may have a couple other avenues, but they're not part of  
17 this motion.

18 So when will you be able to produce the material,  
19 Mr. Temkin, that you agreed to produce on this call?

20 MR. TEMKIN: I would request that we produce it by the  
21 end of next week, by Friday the 6th.

22 THE COURT: All right, that's acceptable to the court.  
23 I do want to get this motion, so to speak, off my docket, and I  
24 think it can be resolved. So after you receive it, I would  
25 like to reconvene either by phone or in person, or receive a

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1 letter from the plaintiff that having received the materials  
2 they're prepared to concede on this motion.

3 So we need to find a mechanism for getting together  
4 again after the 6th. So maybe my clerk will e-mail you after  
5 this call and suggest a date after the 6th, a week or two weeks  
6 after that to convene a telephone conference. Is that  
7 acceptable?

8 MR. TEMKIN: Yes, your Honor.

9 MR. SHORT: I just want to note that --

10 THE COURT: Wait. Who is speaking?

11 MR. SHORT: Sorry, this is Nathan Short.

12 THE COURT: OK, go ahead.

13 MR. SHORT: Your current order requires submissions by  
14 November 20, so we would reconvene on the 20th and we would be  
15 making submissions. I just want to bring that to your  
16 attention.

17 THE COURT: That's right. So I will still ask my  
18 clerk to set up a date following the 6th, maybe a week or two  
19 after, which would include the 20th, in which we can have a  
20 conversation that might result in resolving the motion without  
21 the need for -- okay?

22 MR. TEMKIN: Your Honor, this is Barry Temkin.  
23 Counsel, we did reach out, meet and confer with counsel for the  
24 claimant yesterday.

25 THE COURT: Right.

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1 MR. TEMKIN: And, by the way, I thank the court and  
2 counsel for accommodating my schedule; I had a funeral to  
3 attend on Monday. But we did speak on Monday, and we indicated  
4 that in the event there is significant discovery, that we would  
5 agree that we would request of you, if you think it's  
6 appropriate, your Honor, to consider extending the November 20  
7 date.

8 THE COURT: There is not significant discovery. I  
9 have just ruled on the very limited discovery that is needed.

10 MR. SHORT: OK.

11 THE COURT: Let's not overcomplicate it.

12 MR. TEMKIN: Got it.

13 THE COURT: Let's get a date for a telephone  
14 conference before the 20th.

15 MR. TEMKIN: That week is fine with me, your Honor.  
16 I'm sorry.

17 THE COURT: All right. So I think we have done what  
18 we can on this call, and a date will be set through my clerk  
19 for some day close to the 20th but before it in the hope of  
20 alleviating the need for any further briefing. We shall see.

21 MR. TEMKIN: Thank you, your Honor.

22 THE COURT: Now, do I understand another attorney,  
23 maybe Mr. Pardo, wanted to make a statement for the record?

24 MR. PARDO: Yes, your Honor. Good afternoon. It's  
25 Jim Pardo. I understand you're traveling with a tight

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1 schedule, so I will try to be quick. I hope you're somewhere  
2 nice.

3 THE COURT: OK. Go ahead.

4 MR. PARDO: The parties in the Breaux Bridge case have  
5 reached a settlement in principle. We have agreed on an amount  
6 and terms to resolve all claims, all wells, the case in its  
7 entirety.

8 THE COURT: Great.

9 MR. PARDO: I wanted to report that to you. It is  
10 subject to obviously the usual caveats. The town of Breaux  
11 Bridge needs to convene and approve the settlement.

12 THE COURT: OK.

13 MR. PARDO: They will next meet I believe it's  
14 November 10. Ms. Burke may correct me on that, but it's a  
15 couple weeks from today.

16 We, the defendants, are running the deal -- it's an  
17 attorney recommended by everyone -- out to our clients. I am  
18 confident at the numbers we are dealing with that we will get  
19 complete group approval. I'm also confident we will get an  
20 agreement on allocation among the defendants. So, I am very  
21 confident, and I am reporting that I believe we will have a  
22 deal and that we can have it papered by the end -- at the  
23 latest, by the end of next month.

24 THE COURT: Excellent. So by 2016 I won't see this  
25 case alive. That's good. So I look forward to receiving the

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1 papers that will result in resolving this particular case. Now  
2 if you could resolve the whole MDL, that would be good too.

3 MR. PARDO: I'm working on it.

4 THE COURT: Very good. Is there anything further for  
5 today's call?

6 MS. BURKE: Yes. Your Honor, this is Carla Burke on  
7 behalf of Breaux Bridge. We are in the middle of a briefing  
8 schedule on the motion to dismiss. So, the plaintiff has an  
9 opposition that is due next Tuesday. I share Mr. Pardo's  
10 confidence that this case will be fully settled by the middle  
11 or end of November, but we are stuck with this briefing  
12 schedule unless your Honor postpones it or kicks it off a bit.

13 THE COURT: Right. I think that I was asked to and  
14 said no, because if they want to settle this case, get it done.  
15 But given the statement on the record today of the confidence  
16 of both sides, I will reluctantly but realistically just  
17 adjourn the response sine die.

18 MR. PARDO: Thank you, your Honor.

19 MS. BURKE: Thank you.

20 THE COURT: Anything further?

21 MR. PARDO: No. Thank you for your time.

22 THE COURT: Thank you.

23 (Adjourned)